

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|-------------------------------|---|-------------------|
| DAVID L. KILLINGSWORTH, |) | 4:11CV3222 |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | MEMORANDUM |
| |) | AND ORDER |
| DIANE SABATKA-RINE, Warden, |) | |
| and ROBERT HOUSTON, Director, |) | |
| |) | |
| Respondents. |) | |

This matter is before the court on Petitioner David Killingsworth's ("Petitioner") motion for extension of time to file a notice of appeal. (Filing No. [44](#).) The court previously determined that Petitioner did not file a timely notice of appeal. (Filing No. [41](#).)

Rule 4 of the Federal Rules of Appellate Procedure requires a party to file a notice of appeal within 30 days after the challenged judgment is entered. [Fed. R. App. P. 4\(a\)\(1\)](#). Here, judgment was entered by the court on November 5, 2012, and Petitioner filed a Notice of Appeal on December 12, 2012. (Filing Nos. [33](#) and [39](#).)

Rule 4(a)(5) allows a party to move the district court to extend the time to file a notice of appeal if "(a) *he moves no more than thirty days after the original thirty day deadline has passed*, and (b) he shows good cause." [Pugh v. Minnesota, 380 Fed. Appx. 558, 559 \(8th Cir. 2010\)](#) (emphasis added). Accordingly, Petitioner was required to file his motion for extension of time by January 5, 2013. He filed his motion on February 7, 2013, more than thirty days after the original thirty-day deadline had passed. (See Filing No. [44](#).) Thus, Petitioner has not complied with Rule 4's time limits, which are "mandatory and jurisdictional." [Browder v. Dir. Dep't. of Corr., 434 U.S. 257, 264 \(1978\)](#). Moreover, Petitioner's untimely notice of

appeal cannot serve as a motion for extension of time to file an appeal. Burgs v. Johnson Cnty., Iowa, 79 F.3d 701, 702 (8th Cir. 1996).

IT IS THEREFORE ORDERED that:

1. Petitioner's Motion for Extension of Time is denied. (Filing No. [44](#).)
2. The clerk's office shall not process the appeal to the Eighth Circuit Court of Appeals.
3. The clerk's office shall send a copy of this Memorandum and Order to the Clerk of the Eighth Circuit Court of Appeals.

DATED this 22nd day of February, 2013.

BY THE COURT:

s/ Joseph F. Bataillon
United States District Judge

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